

CPCS Children & Family Law

Winter 2003

Volume 5, No. 1

CAFL Attorney Appointed to Juvenile Court

Boston attorney Leslie Donohue was recently appointed to the Juvenile Court. Attorney Donohue has practiced in the Juvenile Court for many years. In 2001, she received the CPCS Mary Fitzpatrick Award for her years of devotion to CAFL work.

CPCS Announces Presentation of 2002 Awards

At the May 10, 2002 Annual Training Conference, CPCS presented the Fifth Annual Mental Health Advocacy and Children & Family Law Awards to MHLU Attorney Michael Farrington and CAFL Attorney Dorothy Storrow. See page 19 for further details about these and other awards presented at the May conference.

CPCS Annual Training Conference & 2003 Awards

The 2003 CPCS Annual Training Conference will be held on *Friday, May 9, 2003*, from about 8:30-5:00 at the Worcester Centrum Centre in downtown Worcester. Criminal Law, Children and Family Law, Appellate and Mental Health programs will be offered. The cost for the conference is a \$95.00 contribution to the Training Trust. This entitles participants to attend all seminars and the awards luncheon, and to receive conference materials from all of the programs offered. Enrollment is limited and available slots will be filled on a first-registered, first-served basis. The conference is only open to attorneys who accept assignments through CPCS. Please use the registration form posted at our website at www.state.ma.us/cpcs/training. See page 22 for information about nominations for the 2003 awards.

CAFL Recent Developments

Also available on the web is the most recent review of appellate decisions in Children and Family Law cases. [CAFL Case Summaries](#) in Adobe PDF format. They include cases from December 2001 through December 2002.

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Committee for Public Counsel Services

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CPCS NEWS IN BRIEF

Changes to Experts Rates and Qualifications

CPCS has completed its periodic review of rates and qualifications for experts. The review resulted in changes for most categories. These changes are effective with services rendered on or after 9/1/2002. Please see the schedule posted in the billing information section of our website at www.state.ma.us/cpcs/forms/ExpertQualificationsandRates.pdf.

Changes to CAFL Staff

CAFL is pleased to welcome Melisa Carter to the Boston CAFL staff. Melisa provides support to Margaret Winchester and Amy Karp. Peter Heffernan will soon be joining the Salem office as a staff attorney. After graduating from George Washington U. Law School in 2000, Peter worked as a litigation associate at Foley Hoag. Prior to law school he taught for a number of years at the Italian Home. Drew Don has left the CAFL Salem Office to enter private practice. We wish Drew the best of luck!

And Changes to the CAFL Newsletter

Thanks to Stan Goldman's outstanding computer skills and constant dedication to his web page, the MHLU is no longer in need of a newsletter. News, legal information, and resources are all available on his wonderful web site at www.state.ma.us/cpcs/mhp, which is updated frequently. The CPCS Civil Litigation Newsletter is thus returning to its former identity as the "CAFL" newsletter. For those of you who were wondering, this is the first newsletter since last winter. Sorry for the delay!

CAFL Regional Coordinators

CAFL is pleased to announce we have contracted with several new Regional Coordinators for the 2002-2003 year. Included among the new Regional Coordinators are Attorneys Brian Dunn and Ann Crowley. A complete listing, with addresses, phone numbers, and e-mail can be found at <http://www.state.ma.us/cpcs/CAFL/rc.htm>.

Approved CLES Now on the Web

A list of CAFL approved CLE programs can be found on our website at www.state.ma.us/cpcs/CAFL/. To request approval for programs not on the list, please fax a description to Training Director Amy Karp at 617-988-8455 or email her at akarp@publiccounsel.net. As a reminder, in order to maintain CAFL trial panel certification, attorneys must complete eight hours of approved legal education programs each fiscal year subsequent to the year in which they completed the basic certification training. The fiscal year runs from July 1 to June 30. Please submit proof of attendance to Rita Caso, CAFL Certification Coordinator, CPCS, 44 Bromfield Street, Boston, MA 02108.

MCLE Child Welfare Conference

MCLE's Second Annual Child Welfare Conference will be held **Friday, February 7, 2003**. Topics include permanency planning, immigration, interstate issues, medical issues, paternity and working with non-offending mothers. For further details see www.mcle.org.

CHIEF COUNSEL'S MESSAGE

Just two months from now, on March 18, 2003, large segments of the legal community will celebrate the fortieth anniversary of the landmark right to counsel decision in Gideon v. Wainwright, 372 U.S. 335 (1963). The decision is famous for its rare Supreme Court unanimity in overruling the controlling precedent of Betts v. Brady, and its evident pride in the fairness of our justice system (“The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours”). The decision soon became etched in American history by publication of Anthony Lewis’ best-selling Gideon’s Trumpet, and by the perennially popular movie of the same title, starring Henry Fonda as Clarence Earl Gideon. Amid all the acclamation and self-congratulation, few people paid heed to Lewis’ warning that fulfillment of the Gideon promise would hardly be self-executing:

It will be an enormous social task to bring to life the dream of [Gideon] – the dream of a vast, diverse country in which every man charged with crime will be capably defended, no matter what his economic circumstances, and in which the lawyer representing him will do so proudly, without resentment at an unfair burden, sure of the support needed to make an adequate defense.

Likewise, few people then or now were aware of the critical role which Massachusetts lawyers – specifically, Massachusetts prosecutors – played in the development of this historic decision. Here’s what happened: the Florida Attorney General sent a routine letter to his counterparts in other states requesting amicus assistance. Walter Mondale, then the Minnesota AG, disagreed vigorously with Florida’s position, and told them so. He then sent a copy of his correspondence to several other Attorney Generals, including Edward J. McCormack, Jr. of Massachusetts, who passed it along to the chief of his Division of Civil Rights and Civil Liberties, Gerald A. Berlin. It was Attorney Berlin who decided to write in support of Mr. Gideon and the right to counsel. This he proceeded to do and, aided by the lobbying assistance of AGs McCormack and Mondale, accomplished the following spectacular result:

The Court in Betts v. Brady departed from the sound wisdom upon which the Court’s holding in Powell v. Alabama rested. Florida, supported by two other States, has asked that Betts v. Brady be left intact. Twenty-two States, as friends of the Court, argue that Betts was “an anachronism when handed down” and that it should now be overruled. We agree.

The judgment is reversed and the cause is remanded to the Supreme Court of Florida for further action not inconsistent with this opinion. (372 U.S. at 345)

Finally, not everyone is aware that at the time of the Gideon decision, Massachusetts had not only, by decisions of the Supreme Judicial Court, required the assignment of counsel for poor people in felony cases, but had, by legislative passage and gubernatorial enactment, already established a statewide public defender agency, the Massachusetts Defenders Committee, in 1960. Thus, by the time that Gideon became the law of the land, Massachusetts had already far surpassed the minimal compliance required by the Constitution. Massachusetts stood, at that time, as a standard-setter in the provision of counsel to indigent persons charged with crime, and an enlightened model for states less protective of individual liberty.

How dramatically and how sadly the times have changed since 1963. It is true that Massachusetts has become and today remains a national leader in the rigor of its certification and training and performance standards. But this Commonwealth, which once set the constitutional standard for the nation, even to the point of intervening on behalf of unprotected criminal defendants in seemingly less enlightened jurisdictions, has fallen precipitously compared with other states in the hourly rates it pays to counsel for the poor. In a counsel system which is heavily weighted toward private counsel assignments, CPCS-certified counsel are compensated at hourly rates which are among the lowest in the country, and which are inadequate to maintain even a modest law office. It is therefore unsurprising that more and more attorneys have become unavailable for court assignments, or have removed themselves from CPCS certification lists entirely. The result is an escalating constitutional crisis, in which the right of the poor to be represented by counsel is being undermined by the Commonwealth's unwillingness to pay for legal representation which the Constitution and the laws of the Commonwealth require.

At its meeting on December 11, 2002, the Committee for Public Counsel Services, after considering the evidence taken at the recent public hearings on private counsel compensation, and the hourly rates which prevail in Federal Court and all other state systems, voted unanimously to authorize hourly rates of \$120 for murder cases; \$90 for Care and Protection, Superior Court Criminal, Youthful Offender, Sexually Dangerous Person and Sex Offender Registry cases; and \$60 for all other cases, including District Court criminal cases, which alone account for approximately 60% of CPCS assigned counsel cases. (It bears emphasis that these authorized rates cannot, by statute, become effective in the absence of an appropriation, passed by the Legislature and signed by the Governor). The new authorized rates are higher than the \$50/\$65/\$85 levels which the Committee authorized in May, 1994; and they are far higher than the \$30/\$39/\$54 limits imposed annually since fiscal year 1997 by the Legislature.

By any comparative measure, Massachusetts now lags far behind other states in its funding of the right to competent counsel for poor people. When assigned counsel in the Federal District Courts of Boston or Worcester or Springfield are paid at the rate of \$90 per hour, while their CPCS counterpart down the street is paid \$39 per hour to defend against life felonies, can anyone doubt that the state counsel system is fast approaching crisis? When lawyers are paid \$30 per hour to represent children in CHINS and delinquency cases, is anyone surprised that cases are being continued solely due to the lack of a sufficient number of attorneys who can represent people in need at this compensation level?

This Commonwealth pays hundreds of dollars per hour for the legal representation of highly placed officials who come under investigation for alleged wrongdoing. Attorneys at private law firms may charge five to ten or more times the CPCS hourly rate when providing advice or legal counsel in matters of business or commerce. Yet when the liberty or family interests of poor children and adults are at stake, the great principles of equality and fair treatment which inspired the Gideon decision appear to be forgotten.

It is ironic and tragic that Massachusetts, which once breathed life into the Sixth Amendment right to counsel for poor people, is now suffocating that right. This lack of support must be corrected. The time to correct it is now.

CAFL PRACTICE AND PROCEDURE

New Legislation Permits Placement with DSS Without Loss of Custody

The legislature recently enacted legislation amending G.L. c.119, §23(A) to permit DSS to file a petition for “care and responsibility” in the probate court if it determines that continued placement of a child beyond 6 months is required for reasons unrelated to parental unfitness and the parent consents. See Chapter 322 of the Acts of 2002. In allowing the petition the court need only determine that continued placement with DSS is in the child's best interests. Allowance of the petition “shall not abrogate a parent's right to make decisions on behalf of the child.” Annual permanency hearings must be held as long as the child remains in DSS care.

Since promulgation of the federal regulations implementing ASFA, DSS was required to file a §23C petition in order to receive federal funding for voluntary placements beyond 6 months. Parents were faced with the untenable choice of losing needed services for their children or agreeing to a loss of custody. This new legislation permits children to continue in residential placement without the need for parents to lose their right to make decisions concerning their children. The legislation is effective 90 days from enactment, or February, 2003. A copy of the legislation can be found at <http://www.state.ma.us/legis/laws/seslaw02/sl020371.htm>.

There appears to be no right to counsel at the initial hearing, as it is not a proceeding involving “custody.” See c.119, §29. However, parents and children do have a right to counsel at the §29B permanency hearing. It is expected that the probate court will appoint counsel at the time of, or shortly after, the allowance of the petition for purposes of representation at the permanency hearings. Additional information regarding court procedures and the obligations of counsel will be forthcoming.

Crime of Reckless Endangerment Established

In September, the legislature amended G.L. c.265, to provide criminal penalties for a person who “wantonly or recklessly engages in conduct that creates a substantial risk of serious bodily injury or sexual abuse to a child or wantonly or recklessly fails to take reasonable steps to alleviate such risk where there is a duty to act.” See Chapter 322 of the Acts of 2002. A copy of the legislation can be found at <http://www.state.ma.us/legis/laws/seslaw02/sl020322.htm>.

Changes to Mass. Rules of Appellate Procedure

Mass. R. App. P. 11(b) and 22(b) were amended effective September 3, 2002. The amended Rule 11(b) requires petitions for direct appellate review to include a statement whether the issues raised by the appeal were raised and properly preserved in the lower court. Rule 22(b) was amended to permit counsel to request additional time for oral argument “for good cause shown.” Deleted from the rule was language providing that “such requests will rarely be granted.”

DMH Issues Report on Psychiatric Medication for Children

Last February, the Department of Mental Health issued a report, Psychoactive Medication for Children and Adolescents: Orientation for Parents, Guardians, and Others. The report reviews the various medications in current use and discusses principles of practice, including assessment, choosing medications, and monitoring treatment. Also discussed are some areas of controversy such as diagnosis of ADHD and bipolar disorder and medication for children with developmental disabilities. An earlier draft of this report, entitled “Psychopharmacotherapy for Children in Massachusetts,” was included in your training materials for the CAFL program on medical

treatment decisions for children in DSS custody. You can obtain a copy of the final report from DMH's web site at <http://www.state.ma.us/dmh/publications/PsychoactiveBooklet.pdf>.

Educational Services for Institutionalized Youth

The Disability Law Center has initiated a project to increase the access to and secure delivery of appropriate special education services to youth placed in institutions. The target population for this project is youth residing in institutions who have special educational needs, are under the age of 22, and are without a high school diploma. The youth may be residing in mental health facilities, DYS facilities, Houses of Correction or prisons. For further information contact the intake unit at the Disability Law Center at (617) 723-8455 or email Crystal Chow at cchow@dlc-ma.org.

Filing of 23C Petitions On Children of Teens in DSS Custody

CAFL has heard of cases where DSS has filed a G.L. c.119, §23C petition when a teen in DSS custody has a baby on the sole ground that the custody order is necessary for DSS to receive federal reimbursement for the baby's care. Obviously, absent any protective concerns, removing custody from the mother contravenes state law and a parent's constitutional right to the care and custody of her child. Further, custody of the infant is not necessary for DSS to receive federal funding for the care of the baby. Federal law expressly provides states reimbursement for the care of children born to teens in DSS custody. Under 42 USC 675(4)(B) if a child placed in foster or residential care has a son or daughter placed with her, foster care maintenance payments include costs for the care of the son or daughter.

Revised Guidelines for Sua Sponte 23C Cases

The Probate Court has revised its Guideline Procedures for the Placement of Children in the Custody of the Department of Social Services at the Initiative of the Court. There are a handful of changes from the old (pre-ASFA) version. There is a new section (3) on reasonable efforts determinations. Also, section (8) added language that a hearing be held, "preferably within 14 days" of the sua sponte custody order, while retaining the requirement that the hearing be held no later than 45 days after the initial order. The revised Guidelines are available on the CAFL website at www.state.ma.us/cpcs/cafl.

THE SJC ACCEPTS GEORGETTE FOR FURTHER APPELLATE REVIEW

Introduction

Last spring the Appeals Court issued its decision in Care and Protection of Georgette, 54 Mass. App. Ct. 778 (2002), a case that touches on a number of important issues. While this decision can be harmonized in some respects with existing standards set forth by the Massachusetts Rules of Professional Conduct ("Professional Rules"), CAFL Performance Standards, and case law, in other regards it creates some confusion. Among the issues addressed by this opinion are the proper role for attorneys representing children in care and protection cases, conflicts of interest in the representation of multiple clients, the standards for and availability of post-trial relief on the basis of ineffective assistance of counsel, and a judge's reliance on "extrajudicial" information reviewed prior to trial. The SJC has accepted the case for further appellate review and is expected to hear oral argument in January 2003.

Pending the SJC's decision, it is important for counsel to understand the implications of the Appeals Court's decision for trial and appellate practice in this area of the law. The SJC will be reviewing only selected issues; some of those that are not under further appellate review are discussed in the 2002 CAFL case summaries (e.g., the judge's reliance on "extrajudicial information"). [CAFL Case Summaries](#) in Adobe PDF format. This article focuses on those issues to be reviewed by the SJC – the role of child's counsel, conflicts of interest in the representation of multiple clients, and standards for relief from ineffective assistance of counsel.

Factual and Procedural History

DSS filed a care and protection petition as to five siblings, and the Juvenile Court appointed one attorney to represent all five. The legal proceedings continued over the span of several years, eventually culminating in a trial in 1998. Over that time, the two oldest children, Georgette and Lucy, wavered in their position regarding reunification with their father. As of the beginning of trial, Georgette and Lucy, then ages 13 and 11, respectively, expressed a preference to be returned to their father. The attorney for the children informed the judge at trial of the expressed preferences of Georgette and Lucy, but nevertheless proceeded to advocate that neither be returned to their father because he (the attorney) believed that reunification with the father was not in their best interests.

The Juvenile Court dispensed with the need for parental consent to adoption to two of the children, and granted permanent custody of the other three (including Georgette and Lucy) to DSS. The children, through appellate counsel, filed a motion with the Juvenile Court for a new trial pursuant to Mass. R. Civ. Proc. 60(b)(6) on the grounds of ineffective assistance of counsel. Georgette and Lucy argued that they were denied effective assistance of counsel due to their attorney's advocacy for a position contrary to their own and to their attorney's conflict of interest in representing multiple siblings with differing positions. The Juvenile Court denied the motion, expressly stating that trial counsel's representation was in the best interests of Georgette and Lucy and was not in conflict with counsel's obligations to them or to all five siblings. *Id.* at 789. Georgette and Lucy appealed the Juvenile Court's denial of the motion for a new trial. The Appeals Court affirmed the Juvenile Court's decision in all respects. The father, Georgette and Lucy all sought further appellate review, but the SJC accepted only the children's FAR petition on the denial of their motion for a new trial.

The Role of Child's Counsel

The Appeals Court delivered mixed messages regarding the proper role for children's counsel. Portions of the opinion are consistent with the Massachusetts Rules of Professional Conduct ("Professional Rules") and the CAFL Performance Standards, while other sections create some ambiguity. It is hoped that the SJC will clarify these issues. In the meantime, CPCS will continue to advise CAFL attorneys in accordance with the Professional Rules and the CAFL Performance Standards.

The Appeals Court made clear that if counsel had "advocate[ed] against" the children, "taking positions diametrically opposed to theirs, and setting himself squarely against their goals and objectives," he would have violated the ethical standards. *Id.* at 786 n.12. The Court found that the children's trial counsel permissibly diverted from his obligation to advocate for the children's expressed preferences only after determining that the children were not sufficiently mature to make a considered judgment about the litigation. *Id.* at 791 n.18 & n.19. These holdings are consistent with Rule 1.14 of the Massachusetts Rules of Professional Conduct and with CAFL

Performance Standard 1.6.

Under the CAFL Performance Standards, the threshold questions are whether the child is capable of making an adequately considered decision regarding the representation and whether the child's expressed preferences pose a risk of substantial harm. If counsel reasonably determines that the child is competent to make an adequately considered decision, or that the child is unable to do so but the child's expressed preferences would not place him or her at risk of substantial harm, counsel shall represent the child's expressed preferences. See Performance Standards 1.6(b), (d). If the child is incapable of verbalizing a preference, counsel shall make a good faith effort to determine the child's preferences and represent that position or, alternatively, counsel may request the appointment of a guardian ad litem "next friend" to direct counsel in this determination. Performance Standard 1.6(c).

Where the Appeals Court decision is a bit confusing is in its discussion about the proper role for counsel when a child client is unable to make adequately considered decisions about the litigation.

On the one hand, the Appeals Court citing approvingly to an MBA ethics opinion which advised that when representing an incompetent child client, an attorney should proceed on a "substituted judgment basis, i.e., on the basis of what he thinks the child would desire were she competent to understand her options and the risks associated therewith." Georgette, 54 Mass. App. Ct. at 791 n.19. This is consistent with the CAFL Performance Standards. However, the Appeals Court affirmed the lower court's conclusion that trial counsel had provided effective assistance because his representation was in the "best interests" of Georgette and Lucy. Id. at 789. This suggests that the Court did not recognize a distinction between a "best interests" approach and a "substituted judgment" approach for determining a child client's position.

CPCS hopes the SJC will clarify this point, but pending its decision, CPCS will continue to advise attorneys in accordance with the CAFL Performance Standards, which provide counsel with the following options when the child is not competent and the child's expressed preferences would pose risk of substantial harm:

- (i) represent the child's expressed preferences regarding this matter;
- (ii) represent the child's expressed preferences and request the appointment of a guardian ad litem/ investigator to make an independent recommendation to the court with respect to the best interests of the child;
- (iii) inform the court of the child's expressed preferences and request the appointment of a guardian ad litem/next friend to direct counsel in the representation; or
- (iv) inform the court of the child's expressed preferences and determine what the child's preferences would be if he or she was able to make an adequately considered decision regarding the matter and represent the child in accordance with that determination.

See Performance Standard 1.6(d).

In determining what the child's preferences would be if he or she were capable of making adequately considered decisions, as contemplated in (iv), above, the Performance Standards specifically instruct counsel to make a substituted judgment determination. This is a subjective determination that most closely approximates a normal attorney-client relationship by focusing on what a particular child, in a particular situation, would want, as opposed to counsel's opinion of what serves the client's best interests. See Performance Standards 1.6(c), (d), Commentary.

Finally, the Appeals Court quotes from Adoption of Erica, 426 Mass. 55 (1997), in which the SJC stated that the law was unclear regarding the proper role for child's counsel. Georgette, 54 Mass. App. Ct. at 790 & n.17. However, Erica was decided before the SJC adopted Rule 1.14 of the Rules of Professional Conduct. Rule 1.14 now provides clear guidance regarding the obligations of counsel towards incompetent clients, above all, requiring that counsel maintain as normal an attorney-client relationship as possible.

Conflict of Interest

The Appeals Court did not directly address what to do in the event counsel has a conflict of interest in representing multiple siblings. Instead, it affirmed the lower court's finding that trial counsel's representation of all five children did not amount to an impermissible conflict. Georgette, 54 Mass. App. Ct. at 789. (It also thought the matter was not one of great import because it believed, erroneously, that the Juvenile Court now routinely appoints separate counsel for siblings in care and protection cases. Id. at 790 n.16.)

When faced with the representation of multiple siblings with adverse interests, the preferred action is for counsel to decline or withdraw from representation of some or all of the clients and request appointment of successor counsel. A common conflict of interest in Care and Protection cases is when one child's objective is to return to the care of his or her parent and the other child's objective is not. While Professional Rule 1.7 allows an attorney to continue representing multiple clients if he or she reasonably believes the representation will not be adversely affected by a conflict of interest, and each client consents in this hypothetical situation it can be stated as a certainty that the representation will be adversely affected. Although the judge may ultimately find a parent fit to care for one sibling but not another, this does not avoid the untenable conflict of interest. It is impossible, ethically, for counsel to advocate for one child to return to the parent and at the same time advocate for a sibling not to do so. In the process of presenting a case that the parent is fit for one of the children, counsel necessarily and unavoidably undermines the position of the other child. Additionally, it would be a rare case where all siblings were competent to consent to continued representation as required by the rule.

Motion for New Trial Based on Ineffective Assistance of Counsel

In Georgette, the attorneys, the lower court and the Appeals Court all assumed that Mass. R. Civ. P. 59 and 60(b)(6) should govern a motion for new trial based on ineffective assistance of counsel. However, application of these rules is not required, and doing so renders it virtually impossible for a party in a child welfare case to raise a claim of ineffective assistance at the trial level because of the time restrictions and high standards. CPCS hopes the SJC will affirm that the juvenile court has equitable authority to hear a motion for a new trial based on ineffective assistance of counsel within a reasonable period of time following judgment, and that the standard the court should apply is the same standard that an appellate court would use if the claim was raised on direct appeal, i.e., whether the party has established ineffective assistance of counsel under Commonwealth v. Safarian 366 Mass. 89, 96-98 (1974).

In Georgette the Appeals Court affirmed the judge's denial of the children's motion for a new trial on a number of different grounds but primarily because it determined that the children's claim of ineffective assistance did not constitute "extraordinary circumstances," the very high standard required for Rule 60(b)(6) motions. "Rule 60 is to litigation what mouth-to-mouth resuscitation is to first aid: a life saving treatment, applicable in desperate cases." Id. at 788 (citations omitted). The Court noted that the children did not file a motion for new trial within 10 days of judgment

under Rule 59. Id. at 785-786.

It is common in child welfare cases for parties to raise claims of ineffective assistance by way of a Rule 60(b)(6) motion, because it is impossible to file a motion for new trial under Rule 59 within ten days of judgment. The problem is the very high burden imposed on the moving party under Rule 60(b)(6). However counsel should not be bound by the restrictions and high standards found in the Rules of Civil Procedure. The Rules of Civil Procedure do not apply to child welfare cases. Care and Protection of Zelda, 26 Mass. App. Ct. 869, 871 (1989). Although they may be referred to as a cogent standard, id., they should not be used when they would achieve an unreasonable or unjust result, as is the case here. Petition of Worcester's Children's Friend Soc. to Dispense with Consent to Adoption, 9 Mass. App. Ct. 594, 602 (1980) (judge should not have applied the restrictions of Rule 60(b) to mother's motion for relief from judgment). Pending a decision from the SJC, appellate counsel wishing to file a motion for new trial based on ineffective assistance of counsel should consider invoking the equitable authority of the juvenile court to hear such a motion and asserting that Saferian is the applicable standard.

The Appeals Court also held that an attorney's conflict of interest does not constitute ineffective assistance of counsel unless both prongs of the test set forth in Commonwealth v. Saferian, 366 Mass. 89 (1974), are met: 1) that counsel's performance fell below that which may be expected of an ordinary fallible lawyer, and 2) that as a result, the client was deprived of an available, substantial claim or defense that would have resulted in a materially different outcome. Georgette, 54 Mass. App. Ct. at 792-793 and nn.20-21. In other words, the mere existence of a conflict of interest does not constitute ineffective assistance of counsel; there must be some measurable harm to the client as a result of the conflict in order to prevail on a claim of ineffective assistance of counsel. Id. This differs from the rule in criminal cases, which relieves a criminal defendant from showing prejudice if he demonstrates that his attorney had an actual conflict of interest. Id.

Finally, the Appeals Court's opinion suggests that a child may bear some responsibility, in his or her own individual capacity, for voicing to the judge concerns about trial counsel's performance, depending on maturity and competency. Id. at 791 n.19. Children competent enough to direct trial counsel regarding litigation are deemed autonomous and self-aware enough to raise objections to their counsel's actions when presented with opportunities to do so by virtue of their presence in Court. Id.

DSS CORI REGS AND FOSTER/PREADOPTIVE PLACEMENTS

Introduction

Two years ago DSS promulgated emergency, interim regulations governing criminal record offender checks. 110 CMR 18.00 et seq. DSS has revised these regulations several times, most recently on July 18, 2002. Further changes are expected shortly. The CORI regulations are on the DSS web site at www.state.ma.us/dss. Please make sure to inform yourself of any changes.

The CORI regulations create two classes of offenses, lifetime presumptive disqualifications and discretionary disqualifications. Sec. 18.04. Individuals falling into either of these two classes, can nevertheless obtain placement approval in some cases through the review process set forth in the regulations. Persons with lifetime presumptive disqualifications must first obtain approval from a criminal justice official or qualified mental health professional, and then satisfy a DSS review process. Sec. 18.10 & 18.11. Persons with discretionary disqualifications need only satisfy the DSS review. Sec. 18.11. There is an alternate waiver procedure for lifetime presumptive

disqualifications if placement is with kin. Sec. 18.10(1)(c).

Unlike the prior CORI policy, there are no absolute disqualifications. Also, the disqualification categories do not consider the age of the offense (as did the prior CORI policy), although this may be a factor in the review processes.

CORI Investigation

When someone applies to be a foster or preadoptive parent, DSS must conduct a CORI investigation on all household members 14 years or older. Sec. 18.07(5) and Sec. 18.08(2). DSS may also run a CORI check on those under 14 if it is concerned that the youth may pose a risk. Sec. 18.07(5). Household member is broadly defined to include anyone who lives or spends substantial time in the home. Sec. 18.04. This includes non-custodial parents who visit the home, relatives, paramours, others who stay overnight, and regular babysitters. Id. A CORI investigation must also be conducted during the annual reassessment of the home. Sec. 18.08(2)(b).

Although the regulations require a CORI investigation of all household members, they do not expressly disqualify a foster or preadoptive applicant when it is a household member who has been charged with or convicted of a lifetime presumptive or discretionary disqualification. DSS likely intended and would read the regulations to apply them equally to the applicant and all household members, and hopefully will clarify this in later revisions. In any event, DSS retains the discretion to disapprove a foster or preadoptive home. Sec. 18.11.

Lifetime Presumptive Disqualification

Offenses carrying a lifetime presumptive disqualification are listed in section 18.16, Table A. If a prospective foster or preadoptive parent has been charged with or convicted of one of these offenses, he must satisfy the waiver provisions of 18.10. Having satisfied section 18.10, the person with a lifetime presumptive disqualification is then treated as a discretionary disqualification and must also meet the requirements of section 18.11, described below. Sec. 18.10(b). If approved under section 18.11, DSS must wait five days to place the child, during which time the Commissioner may disapprove the placement. Sec. 18.11(4).

Section 18.10 requires that the person's "criminal justice official" state in writing that the person does not pose an unacceptable risk of harm to the child. Sec. 18.10(a)(1). The criminal justice official is the professional with the most recent supervisory responsibility over the person, either a probation officer, parole officer, or superintendent at the correctional facility. Sec. 18.04. If the criminal justice official is unavailable or has insufficient information, the person may request DSS to arrange for an assessment by a "qualified mental health professional" who must conclude that the person does not pose an unacceptable risk of harm to the child. Sec. 18.10(a)(2). Qualified mental health professional is defined in section Sec. 18.04. DSS must pay for the assessment. Sec. 18.10(a)(2).

Placement with Kin Who Fall Into the Lifetime Category

Alternatively, a child may be placed with kin if the DSS Commissioner, Deputy Commissioner for Field Operations, and General Counsel conduct a review and determine the placement is in the child's best interests. Sec. 18.10(c). Kin includes relatives by blood, marriage or adoption, and any significant other adult who the child and parents consider to be family. Sec. 18.04. Given that the person must submit to a mental health assessment within 30 days of placement, the main benefit of this provision is to permit a child to be placed with kin pending completion of the assessment.

This waiver procedure is available only if the crime did not involve a child, the foster or preadoptive parent has a preexisting relationship and bond with the child, and the foster or preadoptive parent agrees to an assessment by a qualified mental health professional within 30 days of placement. Sec. 18.11(9).

In addition, DSS must find that the foster or preadoptive parent, or household member, does not present a risk of harm and that placement is in the child's best interests despite the existence of the criminal conviction. Id. In determining best interests, DSS must consider a number of factors including the date of the conviction, the person's age at the time, the seriousness and specific circumstances, the number of offenses, any relevant evidence of rehabilitation, and any other relevant information. Sec. 18.11(9) and Sec. 18.11(1).

Discretionary Disqualification

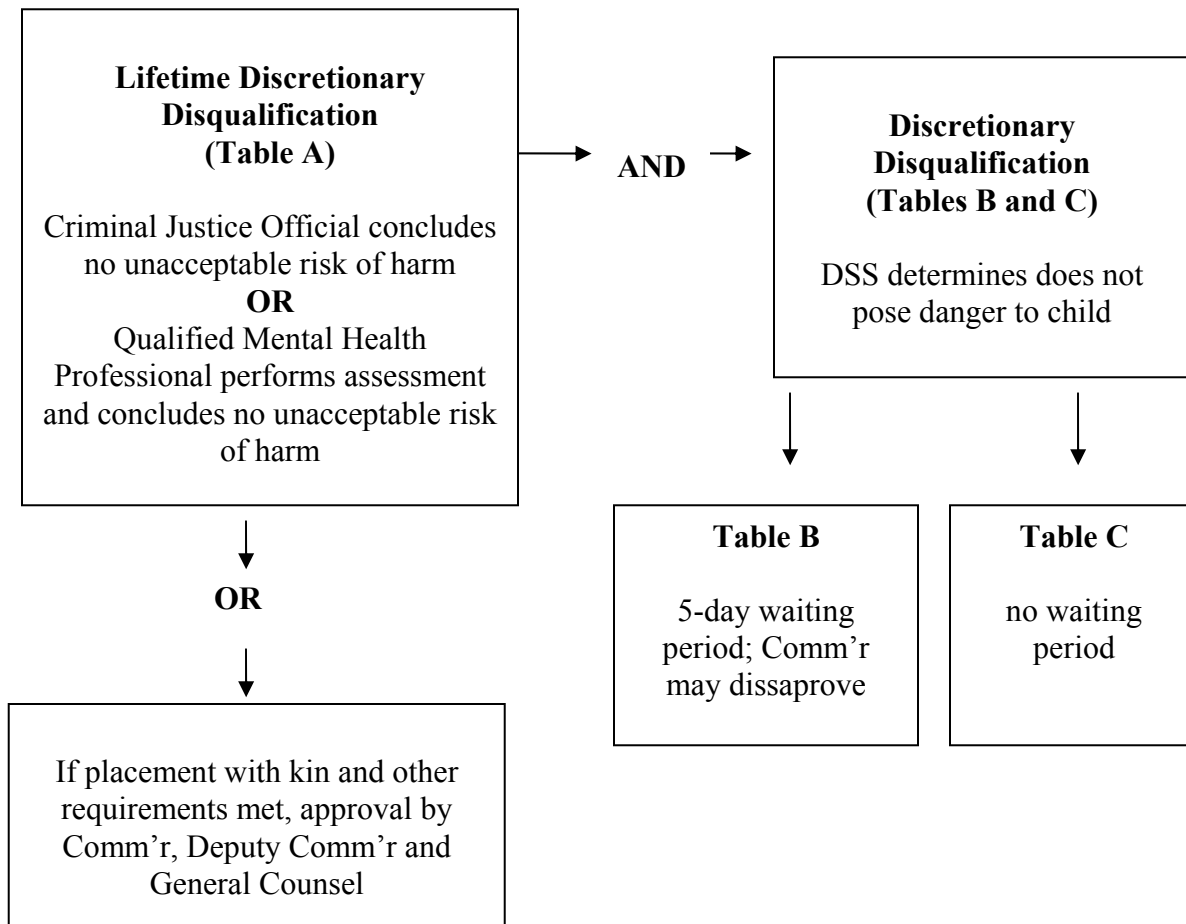
Offenses carrying a discretionary disqualification are listed in section 18.16, Tables B and C. If a prospective foster or preadoptive parent has been charged with or convicted of one of these offenses, he must satisfy the waiver provisions of section 18.11. Once approved, for Table B offenses DSS must wait five days to place the child, during which time the Commissioner may disapprove the placement. This waiting period is not required for offenses listed in Table C. Sec. 18.11(4).

Additionally, in order to be approved, an applicant who has been charged with or convicted of a lifetime presumptive disqualification and has satisfied the requirements of section 18.10, also must satisfy section 18.11.

Section 18.11 requires DSS to determine whether the person poses a danger to the child. DSS must consider the date of the conviction, the person's age at the time, the seriousness and specific circumstances, the number of offenses, any relevant evidence of rehabilitation, and any other relevant information. Sec. 18.11(1). If placement is approved, DSS must put in writing its findings and conclusions. Sec. 18.11(3). No written documentation is required for denials. DSS retains the discretion to approve a foster or preadoptive home. Sec. 18.11.

Misdemeanor Offenses

All placements involving misdemeanor offenses (regardless of whether they are listed in the CORI regulations) must be reviewed under a number of factors identical to those listed in G.L. c.119, §26A and c.210, §3B. Sec. 18.10(3)(b) and Sec. 18.11(10). The factors include the date of the offense, the seriousness and specific circumstances, the number of offenses, the findings and recommendations of the family resource worker, personal or employment references, the child's current and future needs, reports or recommendations from the probation or parole officer, the police report, and discussions with the child, unless that would be inappropriate. Id.



EDUCATION FOR HOMELESS CHILDREN AND YOUTHS

Introduction

The McKinney-Vento Act is a federal law that protects the rights of homeless children to an education. Originally passed in 1987 and reauthorized as part of the "No Child Left Behind Act," effective July 1, 2002, the purpose of this law is to ensure that homeless children are provided with the same free, appropriate, public education that non-homeless children receive. It is codified at 42 U.S.C. §11301 *et seq.*, and many of the substantive provisions are found at 42 U.S.C. §§11431-11434a. Among other things, the law provides homeless children and youth with the right to immediate school enrollment, the right to attend their school of origin (i.e., last school placement) if they prefer, and the right to transportation to and from their school of origin.

When all else is unstable in a homeless child's life, school is often a safe haven. McKinney requires school districts to reach out to these children and families and help minimize the educational instability that can result from homelessness. Many of our clients and/or our clients's children in Care and Protection and CHINS cases meet the McKinney definition of homeless, and may face obstacles to educational stability. It is imperative that attorneys for children and parents in these cases understand the rights and responsibilities of children, parents, schools, DSS, and other agencies that serve homeless children and families.

Definition of Homeless Children and Youth

The McKinney-Vento Act applies a rather expansive definition of homelessness, meaning that it can be used to advocate on behalf of some children who may fall outside of traditional notions of that term. Under McKinney, a child is homeless if she "lack[s] a fixed, regular and adequate nighttime residence." 42 USC §11434a. This includes children who:

- are sharing housing with others due to loss of housing or economic hardship;
- are living in motels, hotels, trailer parks or camping grounds due to lack of alternative adequate accommodations;
- are living in emergency or transitional shelters;
- remain in a hospital beyond the time that they would normally stay for health reasons because they have been abandoned by their families;
- are awaiting foster care, including children placed in emergency or temporary foster homes for lack of shelter space;
- have a primary nighttime residence that is not designed or ordinarily used for sleeping;
- are living in cars, parks, public spaces, abandoned buildings, substandard housing, bus or train stations or similar settings;
- are school-aged pregnant or parenting teens who are living in teen parenting programs because they have no other available living accommodations.

Id. See also Preliminary Guidance for the Education of Homeless Children and Youth Program, Title VII, Subtitle B of the McKinney Homeless Assistance Act (U.S. Dept. of Education 1995).

Under this broad definition, children residing in DSS shelter care, bridge homes, hotline homes or other temporary placements qualify under McKinney. Children or adolescents living in short-term group homes may also qualify, even if they have been living there for several months or longer. In addition, the definition covers "unaccompanied youths," including runaway and throwaway children, many of whom may be in the CHINS caseload as runaway children, children living with friends, in campgrounds, cars, parks or abandoned buildings. Id. It also includes children living

with their parents in motels or shelters, or in other temporary or inadequate living situations. Id. In determining whether a child or youth is homeless, the relative permanence of the living arrangements should be considered and states and local schools must make determinations on a case-by-case basis. See 1995 Preliminary Guidance.

McKinney's Protections

McKinney provides significant protections for homeless students to ensure educational stability.

- **Right to immediate enrollment.** Schools must immediately enroll homeless children and youth residing in their district, even if the child is unable to produce records normally required for enrollment, such as previous academic records, proof of residency or custodial status, or immunization records. 42 USC §11432(g)(3)(C)(i).
- **Attendance at school of origin.** Students have a right to attend their school of origin. 42 USC §11432(g)(3)(A). School of origin is defined as the school they attended prior to becoming homeless or the school in which they were last enrolled. 42 USC §11432(g)(3)(G). They may attend their school of origin for the period of homelessness and for the remainder of the school year. 42 USC §11432(g)(3)(A).
- **Transportation.** Students who choose to attend their school of origin are entitled to transportation to and from school. If the child continues to live in the district of the school of origin, the school district must provide transportation. If the child is living in a new school district, the two districts must share the responsibility and cost. 42 USC §11432(g)(1)(J)(iii).
- **Enrollment disputes.** If a dispute arises over school selection or enrollment, the student must be enrolled immediately in his school of choice pending resolution of the dispute. 42 USC §11432(g)(3)(E)(i). The school must provide a written explanation of its decision along with notice of the right to appeal. 42 USC §11432(g)(3)(B)(ii) and (E)(ii). In making its determination, the school is to apply a “best interests” standard. 42 USC §11432(g)(3)(A). In determining best interests, the statute requires the school district “to the extent feasible” to keep a student in his school of origin, unless it is contrary to the wishes of the parent or student. Id. The term “feasible” is not defined and federal guidance is expected shortly. Because transportation must be provided, the cost of transportation should not be considered, although the effect of extended travel on the child might very well be a salient factor. An appeal is to the state Department of Education. See Massachusetts State Plan for the Education for Homeless Children and Youths Program (2002) at 7.
- **Equal access to education and services.** McKinney provides that homeless children and youth have the right to receive services for which non-homeless students are eligible, including special education, programs for students with limited English proficiency, vocational and technical education, programs for gifted students, Head Start, school meals and nutrition programs, and health care and mental health services. 42 USC §11432(g)(4). Under McKinney, schools are prohibited from segregating homeless students from their non-homeless peers. 42 USC §11432(e)(3).
- **Special services and accommodations.** Under McKinney, homeless students must have access to education and other services they need in order to meet the state’s academic achievement standards. 42 USC §11431(4). In addition, school districts must remove barriers to the enrollment and retention of homeless students. 42 USC §§11431(2) & 11432(g)(1)(I). These provisions read together provide a powerful tool to advocate that homeless students

receive special services or accommodations to insure they stay in and are successful in school. The Massachusetts Department of Education's State Plan implementing McKinney is even more specific, requiring the state and local school districts to revise, as necessary, local school attendance, grading, credit, tardiness, suspension and expulsion policies that act as barriers to the enrollment and retention of homeless children and youth. See Massachusetts State Plan at 12. Attendance and credit requirements are often insurmountable obstacles for students who bounce from school to school, are working to support themselves, or who have babies. In addition, homeless children and youth may exhibit behavioral problems as a result of their unstable living situation, which may subject them to disciplinary proceedings. McKinney can be used to advocate that schools waive or modify their policies for homeless students.

- **Local and state contacts.** Every school district is required to appoint a homeless liaison responsible for implementing McKinney. Although not all have done so, a list of liaisons can be found at the website for the New England Network for Child, Youth & Family Services at <http://nenetwork.org/info-policy/WashHotline/mass.homelessliaisons.html>. At the Department of Education, the state contact is the Office of the Coordinator for the Education of Homeless Children and Youths at 781-338-6294.

Inadequate Enforcement of McKinney

Despite these unequivocal protections contained in the McKinney-Vento Act, homeless children continue to experience difficulties regarding school. Some of the more common ways in which school districts have been known to violate the educational rights of children include:

- refusing to enroll because of residency requirements, lack of birth certificate, or lack of proof of custody;
- refusing to enroll because of lack of educational, medical, or immunization records;
- refusing to allow continued attendance at school of origin;
- denying services offered to other students
- using special education issues as a pretext for refusal to enroll;
- refusing to transport or cooperate with other school districts in providing transportation; and
- telling students they don't have sufficient credits to enroll in an age-appropriate grade level, even though the student may be academically qualified to join his peers.

Obviously, much of the responsibility for serving and protecting the interests of homeless children falls on the schools. Counsel for children and parents can play an active role in advocating with the schools to ensure compliance with McKinney's enrollment requirements. Once enrolled in school, attorneys can advocate for special services and accommodations to enable homeless students to actually succeed, such as waiving tardiness policies, permitting students to make-up missed work, or providing special tutoring. In addition, other agencies that serve these same children, like DSS, the Department of Transitional Assistance, and the Department of Mental Health, *also* have an obligation under McKinney. Attorneys can advance McKinney's goal of educational stability by addressing the underlying problems, namely the instability of living situations for children and families served by those agencies. By advocating for children to remain in their communities where appropriate, and when that is not possible, to at least minimize the number of placements, children can be assured some measure of educational stability.

Please contact us at CPCS if you need assistance in a case involving McKinney, or to share information about your clients' experiences with these issues. There is an active coalition of homeless advocates and a statewide advisory committee both addressing issues involving implementation of McKinney. We would like to share with them our clients' concerns and

problems. Please call or email Andrew Hoffman at 617-988-8441, ahoffman@publiccounsel.net, or Amy Karp at 617-988-8382 or akarp@publiccounsel.net.

For more information about McKinney-Vento visit the websites of the National Center for Homeless Education at <http://www.serve.org/nche/>, the National Coalition for the Homeless at <http://www.nationalhomeless.org/reauthorization.html>, or the U.S. Department of Education's "No Child Left Behind" web site at <http://www.NoChildLeftBehind.gov>.

COMMUNICATING WITH DSS EMPLOYEES UNDER THE NEW MASS. R. PROF. CONDUCT 4.2

Introduction

Child welfare attorneys have long wondered whether they may talk directly to DSS social workers, supervisors and other employees without the permission of the DSS attorney on the case. Rule 4.2 of the Massachusetts Rules of Professional Conduct prohibits a lawyer from communicating with a person represented by counsel, unless the person's lawyer consents. Comment (4) discusses application of the Rule when the represented "person" is an organization such as DSS. In Messing, Rudavsky & Weliky, P.C. v. President and Fellows of Harvard College, 436 Mass. 347 (2002), the SJC held that Rule 4.2 prohibits ex parte contact only with those employees: (1) "who exercise managerial responsibility in the matter;" (2) "who are alleged to have committed the wrongful acts at issue in the litigation;" or (3) "who have authority on behalf of the corporation to make decisions about the course of the litigation." Id. at 357. After Messing, the SJC revised Comment [4] of the Rule to conform to its decision. 437 Mass. 1301 (2002).

The Court in Messing acknowledged that its decision does not provide a "bright-line rule" and that further litigation may be necessary to define its parameters. 436 Mass. at 359. The new test for determining which employees of an organization are covered by Rule 4.2's prohibition, appears to exclude DSS social workers and other non-supervisory employees. However, other language in Messing suggests that if the question came before the Court, it might find that the Rule's purpose is advanced by barring counsel from talking to a DSS social worker without permission of the DSS attorney. There are arguments both for and against prohibiting such ex parte contact. Of course, under Mass. R. Prof. C. 3.4(f) (1) the DSS attorney can instruct the social worker not to talk to the attorneys for parents or the children. Thus, you may ultimately need to obtain consent of the DSS attorney for such communications.

The Messing Case

In Messing, a law firm (MR&W) filed a gender discrimination and retaliation complaint against Harvard with the Massachusetts Commission against Discrimination on behalf of its client, a sergeant with the Harvard police. Without the consent of Harvard's attorney, MR&W communicated with five employees of the Harvard police: two lieutenants, two patrol officers and a dispatcher. Although the two lieutenants had some supervisory authority over the sergeant, none of the five employees were involved in the alleged discrimination or exercised management authority with respect to the alleged discriminatory acts. Id. at 350.

The SJC held that MR&W's communications with the employees did not violate Rule 4.2. The Court focused on the third category of employees listed in the old Comment [4] to the Rule, persons "whose

statement may constitute an admission on the part of the organization.” *Id.* at 354-360. According to the Court, this interpretation of Rule 4.2 “would effectively prohibit the questioning of all employees who can offer information helpful to the litigation.” *Id.* at 356-357. The SJC held that this interpretation was “overly protective of the organization and too restrictive of an opposing attorney’s ability to contact and interview employees of an adversary organization.” *Id.* at 357. Instead, the Rule should be interpreted “to ban contact only with those employees who have the authority to commit the organization to a position regarding the subject matter of representation,” that is, those with “speaking authority” who can bind the organization or make decisions about the course of the litigation, “such as when to initiate suit, and when to settle a case.” *Id.* (citations omitted).

This interpretation of Rule 4.2 is consistent with its purpose, that is, to protect the attorney-client relationship and prevent clients from making ill-advised statements without the advice of counsel. *Id.* at 358. The Rule is not designed to protect organizations from the disclosure of prejudicial facts. *Id.* “The test we adopt protects an organizational party against improper advances and influence by an attorney, while still promoting access to relevant facts.” *Id.*

The Court also provided clarification regarding the first category of Comment [4], employees having managerial responsibility over the matter. Not all employees with some supervisory power over their co-workers are deemed to have “managerial” responsibility as intended by the Comment. *Id.* at 361. “[S]upervision of a small group of workers would not constitute a managerial position within a corporation.” *Id.* (citations omitted). Further, the Comment includes “only those employees who have supervisory authority over the events at issue in the litigation.” *Id.*

Application of Messing to Child Welfare Cases

Messing and the revised Comment appear to permit ex parte communication with non-supervisory DSS social workers in child welfare cases. First, these employees do not exercise “managerial responsibility” with regard to the matter at issue in the litigation. Second, social workers are not alleged to have committed the “wrongful acts at issue in the litigation.” Third, social workers do not have authority to make decisions about the course of the litigation. Finally, permitting ex parte communication with social workers advances the Rule’s purpose, to allow a party access to relevant facts about the case.

The Rule is likely inapplicable as well to “specialists” employed by DSS, such as domestic violence or substance abuse professionals, who are serving in direct care rather than supervisory roles. In addition, under Messing, supervisors who are not involved in the case in question, that is, those who do not oversee social workers working directly on that case, are not covered by the Rule. Similarly, higher-level administrators may not be covered by the Rule if they are not directly supervising the social worker or supervisor.

In contrast, any supervisor who has decision-making power with respect to the “subject of the litigation,” that is, the supervisor(s) who oversees the social worker’s direct care of a family, is likely covered. In addition, those in the direct chain of command for a given case (e.g., assistant program manager, area director) are likely covered by the Rule’s prohibition, as are the highest echelon administrators, such as the Commissioner, who can determine DSS’ actions in any given case.

However, it should be pointed out that child welfare cases differ considerably from cases like Messing. In Messing, as is typical in employment discrimination cases, the plaintiff’s attorneys sought to

investigate the facts by talking to other employees about the practices of their employer. The employees they talked to had no involvement in the alleged discrimination. In contrast, in a child welfare case the DSS social worker is directly involved in the subject of the litigation. The SJC in Messing remarked that its ruling adequately protected organizations by prohibiting ex parte contacts with employees “who are so closely tied with the organization or the events at issue that it would be unfair to interview them without the presence of the organization’s counsel.” Id. at 358-359. Unlike the employees in Messing, the DSS social worker in a child welfare case is closely tied with events at issue in the litigation. The Court might be concerned that they are just the sort of employees who might make “ill-advised statements” and who need protection from “improper advances and influence by an attorney.” Id. at 358. If faced with the issue, the SJC might hold that DSS social workers should be covered by the Rule.

On the other hand, permitting such contact advances the Rule’s purpose. The DSS social worker is the primary source of information about the case and without easy access to the social worker, the attorney’s investigation and case preparation would be severely hampered. Even locating a client may be impossible without a call to the social worker. Unlike other civil litigation, deposition practice is rare in child welfare cases, making effective discovery even more difficult. Further, communications with the social worker are not merely investigatory. Because DSS is providing ongoing services, it is crucial that the attorney be able to talk to the social worker about the client’s needs, what services are being provided and how the client is doing. Indeed, the attorney may be able to provide helpful information to the social worker. Requiring the DSS attorney to act as intermediary for all communications would be unworkable in most cases.

Finally, the Rules of Professional Conduct permit the DSS attorney to instruct any DSS employee not to speak with other counsel about the case. Rule 3.4(f)(1). Thus, even if Messing permits counsel to initiate ex parte contact, continued communication will likely require the assent of the DSS attorney.

Conclusion

Many attorneys for children and parents may still wish to request permission from the DSS attorney before speaking with their client’s social worker. However, in situations where permission is not readily available, Messing and the changes to Rule 4.2 appear to permit ex parte contact.

WITH GRATITUDE FOR OUTSTANDING SERVICE, CPCS PROUDLY ANNOUNCES ITS 2002 AWARDS RECIPIENTS

Edward J. Duggan Awards for Outstanding Service:

Randolph Gioia, Esq.

Randy Gioia is a trial attorney concentrating in the area of criminal defense litigation. He is a graduate of Columbia College and Boston University School of Law. He has been the chair of the Suffolk County Bar Advocate Steering Committee and co chair of the Boston Bar Association’s Criminal Law Section. He is a member of the Committee for Public Counsel Services Advisory Committee, which recommends certification of attorneys for murder and superior court appointments. He is also the co chair of Suffolk Lawyers for Justice, Inc., a nonprofit corporation responsible for the administration of the delivery of legal services to indigent people charged with crimes in Suffolk County. He is a Contributing Author of: “Trying Sex Offenses in Massachusetts,” MCLE, 1998; and “Crime and Consequences,” MCLE, 2001. He defends the accused in both state

and federal court.

Benjamin Keehn, Esq.

Benjamin H. Keehn is a 1983 graduate of Northeastern University School of Law. After a clerkship with the Massachusetts Appeals Court and a two-year stint in the public defender's office in West Palm Beach, Florida, he was hired by CPCS to work in the Public Defender Division in 1987. Ben Keehn worked in the trial unit in the Roxbury and Boston offices, before moving to the Appeals Unit in 1990. As an appellate defender, he has been counsel of record in dozens of cases decided by the SJC and the Appeals Court, including *Commonwealth v. Jones* (1996), which established that pretrial identifications that are not the product of state action may still be suppressed, and, most recently, *Commonwealth v. White* (2002), which established the relevance of an inmate's good behavior while incarcerated awaiting re-sentencing. In 1997, in the case of *Landry v. Attorney General*, Ben Keehn and John Reinstein of the Massachusetts Civil Liberties Union, challenged the constitutionality of the DNA data bank statute on behalf of seven prisoners, probationers, and parolees. After he and John Reinstein obtained a wonderful decision from Judge Isaac Borenstein in August of 1998, enjoining enforcement of the statute on the grounds that it violated the plaintiffs' right to be free from unreasonable search and seizure, the SJC reversed Judge Borenstein and upheld the statute. In 2002, Ben Keehn became CPCS's first Appellate Counsel to the Trial Unit. In that capacity, he has worked as co-counsel with public defenders in the Trial Unit developing and preserving issues in cases likely to wind up on appeal.

Thurgood Marshall Award:

Sam Silverman, Esq.

Sam Silverman came to the law late in his professional life. He attended the City College of the City University of New York, and earned his Bachelors degree in Chemical Engineering. He was a physicist who taught at Boston College and later went to Suffolk University Law School. He was admitted to the Bar in 1982. After his retirement from Boston College, he began the practice of law. Sam represents criminal defendants on appeals. It was Sam's superb and relentless work on behalf of an innocent person, Angel Hernandez, who was wrongly convicted of rape in 1988 that ultimately lead to his exoneration and release. Though he is retired from Boston College, he still continues his research as a physicist and is considered one of the Country's leading authorities on the aurora borealis (the Northern Lights).

Jay D. Blitzman Award for Youth Advocacy:

Second Thoughts" Program

The Second Thoughts Program at MCI Norfolk is directed by Thomas Koonce. The program is comprised of a group of inmates at MCI-Norfolk, who have developed a program focused on educating juveniles who have been committed to the Department of Youth Services and are completing their treatment. In the past several years, Second Thoughts has counseled hundreds of youths from various juvenile facilities affiliated with DYS. The program's emphasis is on confidentiality and non-confrontation; it is not a "scared straight" type of program. Inmates are permitted to become members only after they have survived a rigorous formal application process that is administered by other members. The program members receive no prison credit for their service. Their goal is to counsel at-risk young people to divert them from further criminal involvement, while encouraging them to make responsible choices. They are effective because they are dedicated and credible.

Paul J. Liacos Mental Health Advocacy Award:

Michael Farrington, Esq.

Michael Farrington is a graduate of Suffolk University Law School, Boston (LL.B., 1967) and Boston College, Newton (B.A., 1962). Attorney Farrington was a trial attorney with the former Massachusetts Defender's Committee from 1968 to 1972. He was the first director of the Suffolk County Bail Appeal Project at the Charles Street Jail; first supervisor of bail officials for the chief justice of the Superior Court; assistant attorney general; and assistant secretary of public safety (Edward J. King administration) 1972 to 1983. He has a private practice with offices in Boston and Quincy, with emphasis on criminal defense, general civil litigation, administrative law, and recently representing respondents opposing SDP petitions. He shared his hard won insights into how to defend clients facing "civil" commitment of a day to life by providing excellent materials and speaking at the statewide Committee for Public Counsel Services training program "Defending the Accused: Sexually Dangerous Person Commitment Proceedings".

Mary C. Fitzpatrick Children and Family Law Award

Dorothy Meyer Storrow, Esq.

Dorothy Meyer Storrow runs her own private practice, representing children and parents in the probate, juvenile, and appellate courts. She has been the Franklin-Berkshire Counties Regional Coordinator of the Committee for Public Counsel's Children and Family Law Program since 1995. As Regional Coordinator, she provides advice and technical assistance to attorneys in child abuse and neglect cases and termination of parental rights proceedings, and serves as liaison between the bar and the courts and the community. She also works as a CAFL appellate and trial panel mentor, providing mentor services for newly certified CAFL trial and appellate attorneys. She shares her knowledge and insight by teaching at training programs for CPCS, Massachusetts Continuing Legal Education, and at the biannual Children's Justice Task Force Conference. She fights every day, for every client, on every case with skill, compassion, and generosity of spirit.

The 2002 CPCS Annual Training Conference was a great success. The Training Unit would like to send a special thank you to the following people who volunteered their time to speak at the Conference: Annabelle Hall, Esq., Carol Donovan, Esq., Joseph Plaud, PhD, Greg Gonzalez, Esq., Bruce Carroll, Esq., Antonia Soares, Esq., Lisa Steele, Esq., John Roemer, Esq., Eduardo Masferrer, Esq., Susan Dillard, Esq., Kathleen McCaffrey, Esq., Ann Crowley, Esq., Mary LeBeau, LICSW, Cathy Brings, LICSW, Mark Shea, Esq., Larry Lopez, Colleen Tynan, Esq., Stuart Hurowitz, Esq., Ben Keehn, Esq., Carol Gray, Esq., Dan Callahan, Esq., Patricia Garin, Esq., Josh Dohan, Esq., Barbara Kaban, Esq., Thomas Grisso, PhD, Anne Goldbach, Esq., Harry Miles, Esq., Paul McManus, Esq., Wilson Dobson, PE, and Lucinda Brown. Also a special thank you goes out to support staff who helped out with registration: Debbie Dellasanta (CPCS Worcester), Melissa Carter (CPCS Boston) and Tamika Jones (CPCS Boston)

2002 Conference Materials on CD-ROM

The materials from the 2002 conference are available on a CD-ROM. If you would like to receive the CD-ROM, please send your request in writing to: CPCS Training Unit, 44 Bromfield Street, Boston, MA 02108. CPCS requests a contribution of \$25.00 to the CPCS Training Trust to help defer costs and aid in future training initiatives.

CPCS ACCEPTS NOMINATIONS FOR 2003 AWARDS

At CPCS's Annual Training Conference on May 9, 2003, CPCS will present its annual awards, including the Paul J. Liacos Mental Health Advocacy Award and the Mary C. Fitzpatrick Children and Family Law Award. Nominations for all awards should be submitted to William J. Leahy, Chief Counsel, CPCS, 44 Bromfield Street, Boston, MA 02108. The deadline will be sometime in early March. We will keep you updated. A description of the awards follows:

- The **"Edward J. Duggan Award for Outstanding Service"** is given to both a Public Defender and Private Counsel attorney and is named for Edward J. Duggan, who served continuously from 1940 to 1997 as a member of the Voluntary Defenders Committee, the Massachusetts Defenders Committee, and the Committee for Public Counsel Services. The award has been presented each year since 1988 to the public defender and private attorney who best represent zealous advocacy --- the central principle governing the representation of indigents in Massachusetts.
- The **"Thurgood Marshall Award"** recognizes a person who has made significant contributions to the quality of the representation we provide to our clients.
- The **"Jay D. Blitzman Award for Youth Advocacy"** is presented annually to a person who has demonstrated the commitment to juvenile rights which was the hallmark of Judge Blitzman's long career as an advocate. Judge Blitzman was a public defender for twenty years and, in 1992, he became the first director of the Youth Advocacy Project. The award honors a person, who need not be an attorney, who has exhibited both extraordinary dedication and excellent performance in the struggle to assure that children accused of criminal conduct or are otherwise at risk are treated fairly and with dignity.
- The **"Paul J. Liacos Mental Health Advocacy Award"** is presented annually to a public defender or private attorney whose legal advocacy on behalf of indigent persons involved in civil and/or criminal mental health proceedings best exemplifies zealous advocacy in furtherance of all clients' legal interests.
- The **"Mary C. Fitzpatrick Children and Family Law Award"** is presented annually to a public or private attorney who demonstrates zealous advocacy and an extraordinary commitment to the representation of both children and parents in care and protection, children in need of services, and dispensation with consent to adoption cases. The award was named for Judge Fitzpatrick in recognition of her longstanding dedication to the child welfare process and the well-being of children in the Commonwealth. Judge Fitzpatrick has long been an advocate for the recognition of rights of children and parents as well as for the speedy resolution of child welfare matters.